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# CERTIFICATE

## Supreme Court of the United States

**OCTOBER TERM, 1941**

## No. 508

SCRIPPS-HOWARD RADIO, INC.,

*vs.*

FEDERAL COMMUNICATIONS COMMISSION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

**FILED AUGUST 13, 1941.**

# SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

# IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7657

SCRIPPS-HOWARD RADIO, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

**Certificate**—Filed August 8, 1941

The United States Court of Appeals for the District of Columbia certifies that the record in the above entitled case discloses the following:

## STATEMENT OF FACTS

The appellant is an operator of a radio broadcasting station, WCPO, in Cincinnati, Ohio, licensed by the Federal Communications Commission on a frequency of 1200 kc. at 250 watts power, unlimited time. It is alleged that, without a hearing and without notice to appellant, the Commission granted a construction permit to Station WCOL, Inc., licensee of WCOL, a local station at Columbus, Ohio, authorizing it to install the necessary equipment to change its frequency from 1210 kc. to 1200 kc. and to increase its power from 100 to 250 watts, unlimited time. The appellant filed with the Commission an application for a "hearing or rehearing" and also a request that the grant to WCOL be stayed pending the disposition of such applica-
[fol. 2] tion. The Commission denied the application for a "hearing or rehearing" and thus rendered effective the construction permit. Appellant appealed from the order of the Commission granting the permit to WCOL, Inc., and from the order denying its application for a "hearing or rehearing", and it filed its petition for an order to be entered by this court staying the Commission's action pending the appeal. In its reasons for appeal, the appellant alleged in substance and effect that: the Commission was not authorized to grant an application for the construction permit without a public hearing; that in the instant case its action was contrary to its own rules as prescribed in its

guidebook "Standards of Good Engineering Practice"; that if afforded a hearing appellant would show that the Commission's action was not in the public interest and would materially reduce appellant's coverage and result in depriving the listening public of the only local regional non-network service available; that the action of the Commission in refusing a hearing is a violation of the due process clause of the Fifth Amendment.

This court had consistently over a long period of years, and without objection on the part of the Commission, issued [fol. 3] stay orders in cases in which such action was necessary in aid of this court's appellate jurisdiction, but in the instant case the Commission opposed the issuance of a stay order on the ground that this court has no power to issue such an order to the Commission in any case. It relied particularly upon the fact that the Communications Act, which gives to this court power to review the decisions of the Commission upon matters of law, is silent concerning the issuance of stay orders pending the determination of appeals; and argued, therefrom, that as the Act failed, expressly, to grant such power, it must have been the intention of Congress to withhold it. The appellant, on the other hand, relied upon the general grants of power contained in Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code, together with the consistent practice of this court.

On November 15, 1940, the application for stay in this case and another case was heard on argument by this court, [fol. 4] sitting as a court composed of three judges. Thereafter, on February 3, 1941, a written opinion was rendered, in which the contention of the Commission was upheld and the requests for stay orders in both cases were denied. One judge, however, dissented. Copies of the opinion and of the dissenting opinion are attached hereto and made part of this certificate. Thereafter, the application in the present case was set for rehearing, and on April 7, 1941, was then heard by all of the six members of this court. Being unable to agree upon a decision, the judges being equally divided, and the matter being one of importance, this court, therefore, respectfully submits the following question of law arising upon the record, an answer to which is necessary for a proper disposition of the case to the end that a correct result may be reached, and desires the instruc-

tion of the Supreme Court of the United States upon said question, to-wit:

QUESTION CERTIFIED

Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order [fol. 5] from which the appeal was taken, pending the determination of the appeal?

D. Lawrence Groner, C. J.; Harold M. Stephens, J.; Justin Miller, J.; Fred M. Vinson, J.; Henry W. Edgerton, J.; Wiley Rutledge, J.

August 8, 1941.

[fol. 6] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7657

SCRIPPS-HOWARD RADIO, INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7699

PUGET SOUND BROADCASTING COMPANY, INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petitions for Stay Order

Decided February 3, 1941

Paul M. Segal, George S. Smith, and Harry P. Warner, all of Washington, D. C., for appellant in No. 7657.

Ben S. Fisher, of Washington, D. C., for appellant in No. 7699.

William J. Dempsey, William C. Koplovitz, Telford Taylor, and Benedict P. Cottone, all of the Federal Communications Commission, for appellee in No. 7657.

Telford Taylor and Benedict P. Cottone, both of the Federal Communications Commission, for appellee in No. 7699.

Before Stephens, Miller and Rutledge, Associate Justices

OPINION—Filed February 3, 1941

MILLER, Associate Justice:

We have concluded that no stay orders should be entered in these cases. We look to Section 402(b) of the Communications Act [1] for definition of our appellate jurisdiction. Neither in that section nor elsewhere in the Act do we find legislative authorization for the stay, by the United States Court of Appeals for the District of Columbia (formerly the Court of Appeals of the District of Columbia), of any action of the Commission, pending appeal. In sharp contrast we find that Congress incorporated by reference into Section 402(a) of the Act, express provision for the granting of stays by district courts in suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission except those of which this court was given appellate jurisdiction.[2] That this was not the result of legislative oversight seems apparent from the legislative history of Section 402. Approximately one year before the adoption of the Act of 1934, of which the present Section 402 is a part, Congress passed a bill which conferred upon this court power to issue [fol. 7] stays in connection with appeals from the Communications Commission. That bill was pocket vetoed.[3] The provision referred to was omitted from the 1934 Act. This constitutes persuasive evidence that such power was

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[1] Act of June 19, 1934, 48 Stat. 1093, 47 U. S. C. A. § 402 (b).

[2] 48 Stat. 1093, 50 Stat. 197, 47 U. S. C. A. § 402(a); 38 Stat. 220, 28 U. S. C. A. § 47.

[3] This bill (H. R. 7716, 72d Cong., 1st Sess.) contained the following provision: "(f) The court may, subject to the foregoing limitation, upon notice to the commission and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying an action of the commission under the order appealed from, in whole or in part,

withheld deliberately by Congress. Further evidence of the legislative intent is found from the fact that in a number of acts, providing for appeals from administrative agencies, express provision is made for the issuance of stay orders.[4] Moreover, the legislative intent, as revealed in other sections of the Communications Act, seems inconsistent with the contention that this court was intended to have power to issue stay orders in such cases as the present. Thus, in Section 405 it is provided that no application for a rehearing by the Commission "shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Here is clear evidence of legislative intent that these administrative orders shall be speedily enforced, and automatic stays, which might operate in ordinary court proceedings, are expressly forbidden. It can hardly be doubted, in view of this provision and others previously noted, that Congress had clearly in mind, throughout its deliberations, the matter of stay orders, and that it deliberately withheld such power from this court.[5]

In fact, the failure of appellants to request that the Commission stay its own orders, pursuant to applicable provisions of the Act, may very well have constituted a failure

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upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions as the court may deem proper. Pending a hearing upon the application for stay, the court may enter a temporary stay for a period of not to exceed fifteen days." After passing both houses, this bill was pocket-vetoed by the President, March 4, 1933. See Index, 72d Cong., 2d Sess. 249, for history.

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[4] E. g., National Labor Relations Act of July 5, 1935, 49 Stat. 454, 29 U. S. C. A. § 160(e) et seq.; Securities Act of May 27, 1933, 48 Stat. 81, 15 U. S. C. A. § 77i; Natural Gas Act of June 21, 1938, 52 Stat. 831, 15 U. S. C. A. §717r; Bituminous Coal Act of April 26, 1937, 50 Stat. 85, 15 U. S. C. A. § 836(b); Federal Power Act of August 26, 1935, 49 Stat. 861, 16 U. S. C. A. § 825(l); Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 980, 27 U. S. C. A. § 204h; Civil Aeronautics Act of June 23, 1938, 52 Stat. 1024, 49 U. S. C. A. § 646d.

[5] See also, §§ 204, 312(a), 312(b), 408, 416(b).

to exhaust administrative remedies, which would in itself bar relief by judicial review; to say nothing of judicial stay orders. Even appellant's anticipation that such requests would be futile constitutes no excuse for failure to seek such available administrative remedies.[6]

It is contended that this court has power, nevertheless, to issue stay orders in the present cases by virtue of Section [fol. 8] 262 of the Judicial Code,[7] and Section 33 of Title 18 of the District of Columbia Code.[8] It is argued in support of this contention that there is inherent power in the United States Court of Appeals, to preserve the status quo pending determination of the appeal, in order to protect its appellate jurisdiction. We think that both sections, whatever their scope and applicability, speak in terms of the conventional relationship which exists between appellate courts and trial courts in the federal judicial hierarchy. That relationship does not exist between this court and the Communications Commission.[9]

There is no absolute, inherent[10] power to stay even the actions of courts in all cases; and this is especially true where the public interest is involved. The rationale of stay orders and injunctions is that they should be granted only when necessary to protect rights against injuries otherwise

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[6] Red River Broadcasting Co., Inc. v. Federal Communications Commission, 69 App. D. C. 1, 7, 98 F. (2d) 282, 288, cert. denied, 305 U. S. 625.

[7] Act of March 3, 1911, 36 Stat. 1162, 28 U. S. C. A. § 377: "* * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Act of March 3, 1901, 31 Stat. 1227: "The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

[9] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134; Federal Communications Commission v. Columbia Broadcasting System, (No. 39, decided November 25, 1940) — U. S. —.

[10] See Frankfurter and Greene, Congressional Power over the Labor Injunction, 31 Col. L. Rev. 385, 407-408.

irremediable.[11] Such power should not be exercised to enforce a right which is doubtful, or to restrain an act, the injurious consequences of which are trifling.[12] Moreover, when the exercise of such power would be prejudicial to the public interest, a court may refuse thus to protect private rights.[13] When such rights as exist are created by a statute which also declares the remedy, and in doing so fails to provide for stay or injunction process, then the courts should refrain from the use of such process, under the rule that the statutory remedy is exclusive.[14] Where a public interest primarily is involved; where no property [fol. 9] right exists; where such private interest as may exist is secondary and subordinate to the public interest;

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[11] State Corporation Commission v. Wichita Gas Co., 290 U. S. 561, 568. See Beal v. Missouri Pac. R. R. (No. 72, decided January 20, 1941) — U. S. —; Terrace v. Thompson, 263 U. S. 197, 214; Cavanaugh v. Looney, 248 U. S. 453, 456.

[12] See Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 302.

[13] United States v. Morgan, 307 U. S. 183, 194: "* * * the extent to which a court of equity may grant or withhold its aid * * * may be affected by the public interest involved."

Petroleum Exploration, Inc. v. Public Service Commission, 304 U. S. 209, 222-223: "The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant."

Cf. United States ex rel. Greathouse v. Dern, 289 U. S. 352, 359, 360; Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 552; McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 9 Cir., 164 F. 927, cert. denied, 212 U. S. 583; Bliss v. Anaconda Copper Mining Co., D. Mont., 167 F. 342, aff'd sub nom. Bliss v. Washoe Copper Co., 9 Cir., 186 F. 789, appeal dismissed, 231 U. S. 764. See Note, 36 Harv. L. Rev. 211.

[14] See D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 174-175; United States v. Babcock, 250 U. S. 328, 331; United States v. American Bonding Co., 42 App. D. C. 268, 271; Curran v. Delano, 235 Pa. 478, 84 A. 452.

where, as here, an administrative agency has made a determination in the public interest; and where only a question of law is presented on appeal; the issuance of a stay order would seem to constitute an unwarranted interference with administrative action. This is true of injunction process.[15] It would seem to be even more true of the issuance of stays pending appeal; especially where the jurisdiction on appeal is so limited as it is under Section 402(b) (2) of the Communications Act.

The legislative trend is toward restriction of the use of injunction process. A recent striking example is found in the Norris-La Guardia Act,[16] and there are other similar

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[15] See In re Sawyer, 124 U. S. 200, 210: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." At p. 213, the Court quotes with approval from Sheridan v. Colvin, 78 Ill. 237, 247: "It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political nature come within the jurisdiction of the Court of Chancery. Nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." Rule of Sawyer case followed in Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 218, and International News Service v. Associated Press, 248 U. S. 215, 236.

[16] Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. A. § 101 et seq.

statutory limitations of less recent enactment.[17] Self-imposed judicial restraint is commendable, also, whenever a stay order is sought for the purpose of aborting administrative action, unless the law and the facts reveal, clearly, the propriety as well as the power of judicial interference; even in the conventional setting of an appeal from a district court. Thus, for example, in Lukens Steel Co. v. Perkins,[18] the appeal was from a judgment of the District Court; which in turn was based upon pleadings which asserted rights and injuries thereto. On the face of the pleadings this may have seemed to present a situation squarely within the terms of Section 262 of the Judicial Code,[19] and Section [fol. 10] 33 of Title 18 of the District of Columbia Code.[20] Yet, as a careful review of the facts and of the law revealed that the administrative action there involved related only to a matter exclusively executive in character, and as, consequently, the individual appellants had neither private right nor standing in court to sue or appeal, there was no jurisdiction to issue a stay order.[21]

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[17] See, e.g.: Courts of the United States cannot stay proceedings in any court of a state (Jud. Code § 265, 36 Stat. 1162, 28 U. S. C. A. § 379); suits to restrain assessment or collection of taxes shall not be maintained (Rev. Stat. § 3224 —now 53 Stat. 446, 26 U. S. C. A. § 3653); no injunction shall be granted restraining any state officer from enforcing a state statute on the ground that it is unconstitutional, unless certain procedure is followed (36 Stat. 557, 1162, 37id. 1013, 43 id. 938, 28 U. S. C. A. § 380); same as to restraining any Act of Congress (50 Stat. 752, 28 U. S. C. A. § 380a); Clayton Act restrictions (38 Stat. 738, 29 U. S. C. A. § 52).

See also, Frankfurter and Greene, The Labor Injunction (1930) 150-182, 206; Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345; Hutcheson, Jr., A Case for Three Judges, 47 Harv. L. Rev. 795.

[18] 70 App. D. C. 354, 107 F. (2d) 627, rev'd, 310 U. S. 113.

[19] Supra n. 7.

[20] Supra n. 8.

[21] Perkins v. Lukens Steel Co., 310 U. S. 113. Judicial recognition of the trend toward a more restrictive use of injunctions is again illustrated by the recent case of L. Singer & Sons v. Union Pacific R. R., (No. 34, decided December 16, 1940) — U. S. —. In that case, plaintiff sought

The Supreme Court has held that the field of broadcasting is one of free competition and that: "The policy of the Act is clear that *no person is to have anything in the nature of a property right* as a result of the granting of a license."[22] [Italics supplied] As the Act itself provides that no station license shall be granted "until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States * * *",[23] it is obvious that no person, licensee or otherwise, has anything in the nature of a property right which can be asserted against the regulatory power of the United States or against the Commission—which is its administrative agency for that purpose—when it is engaged in the activities enumerated in Section 402(b).

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an injunction to prohibit the construction of a spur track, relying on paragraph 20 of Section 402 of the Transportation Act of 1920 (42 Stat. 478, 49 U. S. C. A. § 1(20)), which allows such a suit by the United States, the Interstate Commerce Commission, any commission or regulating body of the state or states affected, or "any party in interest." Justice McReynolds, speaking for the Court, said: "Such a suit cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law.'" In a concurring opinion—joined by Justices Roberts, Black, Douglas and Murphy—Justice Frankfurter said: "It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1(18) by including a city as a 'party in interest.'" Further, Justice Frankfurter said: "* * * to allow any private interest to thresh out the complicated questions that arise out of § 1 (18-22) * * * is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. * * * These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts."

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[22] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 474, 475.

[23] 48 Stat. 1083, 47 U. S. C. A. § 304.

It is true, as the Supreme Court pointed out in the Tennessee Valley Authority case, that there may be, in addition, three other forms of legal rights, i. e., "one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[24] No doubt it was the last mentioned of these three that was within the contemplation of Congress when it enacted the Communications Act.[25] Apparently the Supreme Court had

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[24] Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 137.

[25] "Sec. 301. * * * no such license shall be construed to create any *right, beyond the terms,* conditions, and periods of the license."

"Sec. 309. * * * (b) * * * (1) The station license shall not vest in the licensee any *right* to operate the station nor any *right* in the use of the frequencies designated in the license *beyond the term* thereof nor in any other manner than authorized therein.

"(2) Neither the license nor the *right granted thereunder* shall be assigned or otherwise transferred in violation of this Act [chapter]."

"Sec. 310. * * * (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the *rights* therein granted shall not be transferred, assigned, or * * * disposed of * * * unless the Commission shall * * * decide that said transfer is in the public interest, and shall give its consent in writing."

"Sec. 313. * * * Whenever in any suit, action, or proceeding * * * any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court * * * may adjudge * * * that the license of such licensee shall * * * be revoked and that all *rights* under such license shall thereupon cease. * * *."

"Sec. 319. * * * (b) * * * The *rights* under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. * * *"

"Sec. 606. * * * (c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all

in mind, also, the same form of right, in statements which [fol. 11] it incorporated into its opinions in the Nelson Brothers case [26] and in the Pottsville case.[27] Such an in-

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stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the *owners*.

"(d) The President shall ascertain the *just compensation for such use or control* and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, *such person* shall be paid only 75 per centum of the amount and *shall be entitled to sue the United States* to recover such further sum as added to such payment of 75 per centum will make such amount as will be *just compensation* for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 41 of Title 28, or by section 250 of Title 28." (Italics supplied.)

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[26] Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 278: "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, *and to have their rights, as established by law*, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power." (Italics supplied.) And in the same case (p. 282) the Supreme Court pointed out that while operators of radio stations had no right superior to the exercise of the Commission's power of regulation, and "made their investments and their contracts in the light of, and subject to, this paramount authority;" nevertheless, in making the necessary adjustments of service (p. 285), "the equities of existing stations undoubtedly demand consideration"

[27] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 137, 138: "No license was to be 'construed to create any right beyond the terms, con-

terest is sufficient to support the standing of an existing [fol. 12] licensee to appeal, as was held in the Sanders case.[28] But that interest, arising from a privilege conferred under the statute, is subordinate to the primary interest of the public in radio broadcasting. The considerations set out in the minority opinion herein were fully considered by this Court in the Yankee Network case;[29] they must have had the attention of the Supreme Court in the Sanders case, and they all seem to be put to rest definitively by that decision.[30] The important consideration is that although the Court recognized rights or interests in a licensee sufficient to give standing to appeal, it denied that such a licensee was entitled to protection against competition; or

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ditions, and periods of the license.' * * * Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the *protection of private as well as public interest.* * * * Thus, it is highly significant that although investment in broadcasting station may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of 'public convenience, interest, or necessity.' The Communications Act is not designed *primarily* as a new code for the adjustment of *conflicting private rights* through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." (Italics supplied.)

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[28] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 477.

[29] Yankee Network, Inc. v. Federal Communications Commission, 71 App. D. C. 11, 15-16, 107 F. (2d) 212, 216-217.

[30] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470.

to resist the grant of a license to another on that ground; and held that the Commission was required to consider the question of financial injury, and make findings thereon, only so far as it concerned the public interest. This being true the conclusion seems inescapable that if such rights or interests are so secondary, subordinate and unprotectable on appeal, they must be equally unprotectable by a stay order pending appeal. What useful purpose could be served by preventing the grant of a license to another, because of competition or financial injury, up to the time of a judgment by this Court, when by the judgment itself no such protection could be afforded?

Neither is it disputed that great investments have been made in these radio broadcasting stations[31] and in the industry which has grown up in connection with them; nor that these investments have value only as a result of the privileges which are extended by the Government in the form of licenses; nor that unlike other forms of freely competitive business, including newspapers and other media, the enjoyment of these investments and the carrying on of business by those engaged in this great industry would constitute criminal conduct except under licenses so granted by the Government.[32] Nevertheless, as the public has a paramount interest in radio broadcasting; as provision for the protection of that interest has been made by the regulatory provisions of the Communications Act; as Congress has created a Commission for that purpose, whose primary duty is to act in the public interest; as Congress has limited the right of appeal under Section 402 (b) to the scant purpose of bringing to the attention of the appellate court errors of law in the action of the Commission; such private rights and interests as may exist are clearly secondary to [fol. 13] the interest of the public. Consequently, on appeals under Section 402 (b) no private interest can be presented to this court, or considered by it, except as it may incidentally relate to some proper legal question affecting the public interest; and it may be considered, even then, only for the purpose of answering those questions in the public interest.

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[31] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 138.

[32] 48 Stat. 1100, 47 U. S. C. A. §§ 501, 502.

That such private interests may be vitally affected or perhaps, in exceptional cases destroyed,[33] as a result of the Commission's actions, is regrettable but unavoidable.[34] One who engages in an industry in which the public has a paramount interest, and in connection with which it withholds the privilege of appeal from administrative action, assumes these risks. In the absence of express or implied legislative recognition of right and provision for appeal, one who suffers under such a law is able to show no more than a mere possible injury to the public; he must look to the political process for relief.[35] In the situation which existed in the Lukens Steel case, Congress withheld entirely any private right or privilege, as well as standing to appeal, in order to insure expeditious administrative action. In the present cases, as the Sanders decision holds, it granted a limited privilege, and provided for a limited appeal, intended merely to bring to the attention of the appellate court errors of law in the actions of the Commission. Certainly it cannot be assumed, in the light of the various considerations heretofore set out, that in doing so it intended to prevent expeditious administrative action by making applicable to the Communications Commission

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[33] Alabama Power Co. v. Ickes, 302 U. S. 464, 479-480: "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results."

[34] Brandeis, The Curse of Bigness (1934) 140-141: "American development can come on the lines on which we seek it, and the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy. It is the relatively small man who pre-eminently needs the aid and the solicitous care of industry and of government."

[35] Perkins v. Lukens Steel Co., 310 U. S. 113, 132, 125.

the stay order procedure—with the "delays necessarily incident to judicial scrutiny"[36]—which is designed for use in the settlement of controversies between private litigants.[37] The issue presented by these cases requires that we assume —for purposes of giving effect to the Commission's actions during the period which must elapse pending disposition of the appeals by this Court—either that it has acted in accordance with the law and the authority conferred upon it or that it has not done so. If the actions are stayed it must be upon the assumption not only that error has been committed in law, but that its consequences will be ruinous to appellants within that period. We think the presumption is to the contrary and that, therefore, to issue stay orders because of such an assumption of error and resulting ruinous consequences, not only would constitute an unwarranted interference with the administrative process, but would ex-
[fol. 44] ceed the jurisdiction which Congress has conferred upon this Court.

The fact that as to actions of the Commission—other than those enumerated in Section 402(b) and which are excepted in Section 402(a)—Congress provided for judicial scrutiny with its attendant delay protected by stay procedure, indicates that appeals to the United States Court of Appeals were limited deliberately to situations in which expeditious administrative action was regarded by Congress as being required for the protection of the paramount public interest, even though that involves subordination of private interests to this purpose. Consequently, as to them, only a minimum of judicial correction was provided; solely upon questions of law, and limited to considerations of public interest. In other respects, as to such actions, the Commission and the public should enjoy the benefit of the presumption that its determinations are correct, and are in the public interest. This result would be defeated if persons who are permitted to show no more than a mere possible injury to the public were permitted to interrupt, indefinitely, the essential activities of this important administrative agency. Looking at the matter realistically, it is probable—as Congress apparently realized—that even in case of an erroneous decision, the Commission, working without judicial interference, would discover and correct

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[36] Perkins v. Lukens Steel Co., 310 U. S. 113, 130.

[37] Cf. Landis, The Administrative Process (1938) 30-34.

the error more quickly and thus better serve the public interest, than would be true under the slow process of stay orders and judicial scrutiny. "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[38] The sections of the Communications Act previously referred to, which confer power upon the Commission to stay its own orders, upon a sufficient showing for that purpose, suggest the legislative intent in this respect.[39]

It is urged that to deny the power of the United States Court of Appeals to issue stay orders in these cases would make our decisions merely advisory. However, the Supreme Court has decided, concerning cases arising under Section 16 of the Radio Act, as amended in 1930:[40]

When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. * * * The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous.

Section 16 of the 1930 Act contains provisions for appeal similar to Section 402(b) of the Communications Act, so [fol. 15] the language of the Nelson Brothers case is equally applicable. Again in the Pottsville case the Supreme Court said: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction."[41] These statements are entirely inconsistent with the theory that our decisions in such cases are merely advisory. It is true that our decisions are limited in their effect. When the United States Court of Appeals lays bare

[38] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 146.

[39] §§ 204, 312(a), 312(b), 405, 408, 416(b).

[40] Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 278.

[41] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 145.

the error of the Commission and compels obedience to its correction, it exhausts the only power which Congress gave it.[42] But even this is much more than a mere advisory opinion rendered in a vacuum and based upon no controversy.

As we pointed out in the Evans case,[43] there is no specific language in the statute which requires strict maintenance of the status quo pending disposition of such appeals as are here involved; the reasoning of the Pottsville case is equally applicable; and in view of the statutory provision for limited judicial review, the issuance of a stay order would have no other consequence than to delay the final determination of the controversy and thus to prevent the prompt and efficient disposition of the Commission's business, in direct contradiction of the administrative purposes of the statute. Moreover, this is true in spite of the fact that if the Commission's unstayed actions render the appeal moot we will be powerless to prevent it.[44] However, we have no reason to assume either the happening of the suggested contingency or that the time has come, in the life of this Commission "when hardship is so acute and general that the good of the device, submerged in the evil, is forgotten and invisible."[45] In any event, it is always possible for Congress to take proper corrective action, as the Commission is its agency, created by it and subject to its restraint.[46] It was Cardozo who "Conceiving the judicial function as dynamic" looked forward to "a more intimate channel of connection between legislatures and courts, bodies which move today in stately isolation."[47] For, indeed "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[48]

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[42] Ibid.

[43] Evans v. Federal Communications Commission, App. D. C. —, —, 113 F. (2d) 166, 169. See 29 Geo. L. J. 68, 70.

[44] Evans v. Federal Communications Commission, App. D. C. —, —, 113 F. (2d) 166, 170.

[45] Cardozo, The Paradoxes of Legal Science (1928) 69.

[46] Perkins v. Lukens Steel Co., 310 U. S. 113, 131.

[47] Cardozo, The Paradoxes of Legal Science (1928) 71, 64.

[48] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 146, quoting from Missouri, K. & T. Ry. v. May, 194 U. S. 267, 270.

Petitions denied.

[fol. 16] DISSENTING OPINION

STEPHENS, Associate Justice, dissenting.

I think the petitions for orders staying the action of the Communications Commission pending the determination of the appeals in these two cases should be granted.

For the purpose of a ruling upon the petitions the facts alleged therein, as well as those alleged in the petitions for appeal, are to be taken as true. These facts are set out in detail in the margin.[1] Stated in general and summary terms they are as follows: The petitioners are licensees operating radio stations. Without a hearing the Commission made orders granting applications to modify the facil-

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[1] No. 7699. Puget Sound Broadcasting Company v. Federal Communications Commission. The petitioner Puget Sound Broadcasting Company operates radio station KVI in Tacoma, Washington. The Queen City Broadcasting Company operates station KIRO in Seattle. Without a hearing, the Commission granted to the Queen City Broadcasting Company a permit to move its transmitter from downtown Seattle to a point about fifteen miles from Seattle and ten miles from Tacoma, and to increase its power from 1,000 to 10,000 watts and to use directional antennae. The effect of this grant is to add another station to the Tacoma listening area. The petitioner has been the outlet for Columbia Broadcasting System chain programs in Tacoma. Columbia has given notice to the petitioner that, as the result of the grant to the Queen City Company, the latter will be selected as Columbia's only outlet for Tacoma. Probable financial loss and possible economic disaster will be occasioned to the petitioner as a result. Not only did the Commission grant the permit to the Queen City Company without a hearing, it also denied petitioner's request for a "rehearing" and opportunity to present evidence to the Commission. The petitioner then appealed to this court and filed its petition for an order staying, pending the appeal, the action of the Commission in granting the permit to the Queen City Broadcasting Company. In its reasons for appeal, the petitioner charges: 1. The Commission erred as a matter of law in totally disregarding the effect that the granting of the KIRO application would have upon listeners in the area in question and the

ities of other existing stations in such manner as will, according to the assertions of the petitioners, adversely affect the [fol. 17] public interest in efficient radio service and also the private business of the petitioners. The petitioners requested a hearing of the Commission but the request was refused. They then appealed from the orders of the Commission—charging error of law in the denial of hearing. Unless orders are issued staying the orders of the Commission pending determination of the appeals, irreparable harm to the public interest and to the private business of

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ability of station KVI to continue its operation in the area in the public interest. 2. The Commission erred as a matter of law in failing to designate the application for hearing to determine how the listening public in the area would be affected by the duplication of chain program service. In its brief in support of the petition for a stay order, the petitioner also asserts that: "It is a definite and certain fact that local organizations and business men and the general listening public in the Tacoma area bitterly resent and object to the encroachment of Station KIRO in the Tacoma area and the termination of the Columbia Broadcasting System affiliation of Station KVI. The Appellant's station KVI, has over a long period of time devoted substantial amounts of program time without charge to civic, educational, and religious organizations located in the Tacoma area. The establishment of Station KIRO at a point near the city of Tacoma, resulting in a duplication to some extent of the service area of Station KVI, will result in a serious reduction in advertising revenue to Appellant's station. This reduction in turn must of necessity entail a discontinuance by Station KVI of many of its public service broadcasts to the damage and injury of the listening public."

No. 7657. Scripps-Howard Radio Company v. Federal Communications Commission. The petitioner Scripps-Howard Radio Company operates radio station WCPO in Cincinnati, Ohio, on a frequency of 1200 kc. at 250 watts power, unlimited time. Without a hearing and without notice to petitioner, the Commission granted a construction permit to station WCOL, Inc., licensee of WCOL, a local station at Columbus, Ohio, authorizing it to install the necessary equipment to change its frequency from 1210 to 1200 kc. and to increase its power from 100 to 250 watts,

the petitioners will as a result of the action of the Commission be occasioned. In short, the petitioners ask for stay orders to preserve the status quo—so that if upon determination of the appeals it is held that they had a right to be heard by the Commission, the conditions existing at the time the orders were made, i. e., before the orders became effective, will remain in being.

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unlimited time. The petitioner filed with the Commission an application for a "hearing or rehearing" and also a request that the grant to WCOL, Inc., be stayed pending the disposition of such application. The Commission denied the application for a "hearing or rehearing" and thus rendered effective the construction permit. At the same time the Commission granted to WHIZ, Zanesville, Ohio, a license to operate on 1210 kc., 250 watts, contingent, however, upon the change by WCOL, Inc., of its frequency from 1210 to 1200 kc. At the time that it made the orders referred to, the Commission in an opinion stated that although the change of frequencies would mean a loss of 20,800 listeners within the primary service area of the petitioner, it would result in an increase of 146,000 listeners within the interference areas of WCOL, Inc., WHIZ, and of a third station WLOK. The petitioner appealed from the order of the Commission denying its application for a "hearing or rehearing" and from the order of the Commission granting the permit to WCOL, Inc., and it also filed its petition for an order staying the Commission's action pending the appeal. In its reasons for appeal the petitioner alleged, in substance and effect, that: The Commission is not authorized to grant an application for a construction permit without a public hearing; the Commission is without power to reduce the petitioner's coverage and thus partially to revoke its license unless after public hearing it determined that such action was in the public interest—to do so would be a violation of the due process clause of the Fifth Amendment; at a hearing the petitioner would present evidence that the proposed change would not be in the public interest for the reason that a substantial portion of the listening public would as a result be deprived of the only local regional non-network service available, and evidence to the effect that the action to be taken is against the rules prescribed in the Commission's guidebook "Standards of Good Engineering Practice."

Three questions are presented: I. Has this court power, for the purpose of preserving the status quo, to stay orders of the Commission pending the hearing and determination of appeals from its orders. II. If the answer to question I is in the affirmative, are the petitioners within the class of persons named in the Communications Act as entitled to take an appeal from orders of the Commission. III. If the answer to question II is also in the affirmative, do the petitioners present upon the face of their petitions for appeal prima facie cases for the consideration of the court.

I

I think the court has power to stay orders of the Commission pending the hearing and determination of appeals from its orders. The Communications Act of 1934, 48 Stat. 1064, as amended by 50 Stat. 189, 47 U. S. C. A. §§ 151 et seq. (Supp. 1937), provides, in respect of appeals:

Sec. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals.

(1) By any applicant for a construction permit for a radio station license, or for renewal of an existing radio [fol. 18] station license, or *for modification of an existing radio station license*, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission *granting* or refusing *any such application.*

Sec. 402. (c) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and *in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. *The court's judgment shall be*

*final*, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28, by appellant, by the Commission, or by any interested party intervening in the appeal. [Italics supplied]

The Judicial Code provides:

Sec. 262. * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. [Act of March 3, 1911, 36 Stat. 1087, 1162, Rev. Stat. § 716, 28 U. S. C. A. § 377]

This section is applicable to the United States Court of Appeals: cf. Federal Trade Commission v. Klesner, 274 U. S. 145, 156 (1927); Claiborne-Annapolis Ferry Company v. United States, 285 U. S. 382 (1932); see also O'Donoghue v. United States, 289 U. S. 516, 551 (1933). The District of Columbia Code provides:

Sec. 230. Writs.—The said court of appeals[2] shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction. [Act of March 3, 1901, 31 Stat. 1189, 1227, D. C. Code (1929) tit. 18, § 33].

Apart from such statutes, appellate courts have inherent power to protect their jurisdiction by appropriate orders. To preserve the status quo temporary injunctions may be issued: Ohio Oil Co. v. Conway, 279 U. S. 813, 815 (1929); Love v. Atchison, Topeka & Santa Fe Railway Co., 185 Fed. 321, 331-2 (C. C. A. 8th, 1911); City of Council Bluffs v. Omaha & Council Bluffs Street Railway Co., 9 F. (2d) 246, 247 (C. C. A. 8th, 1925); or writs of supersedeas: In re Claasen, 140 U. S. 200, 207-8 (1891); In re McKenzie, 180 U. S. 536, 551 (1901); or stay orders: Beaumont, Sour Lake & Western Railway Co. v. United States, 282 U. S. 74, 92 (1930). In respect of temporary injunctions Judge

[2] By Act of June 7, 1934, 48 Stat. 926, Congress enacted that the court of appeals shall "hereafter be known as the United States Court of Appeals for the District of Columbia."

Walter H. Sanborn said in Love v. Atchison, Topeka & Santa Fe Railway Co., supra:

"The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irre- [fol. 19] parable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted. * * *" (185 Fed. at 331-2) Similar language was used again by Judge Sanborn in City of Council Bluffs v. Omaha & Council Bluffs Street Railway Co., supra. Love v. Atchison, Topeka & Santa Fe Railway Co., supra, was cited by the Supreme Court, and Judge Sanborn's language referred to, in Ohio Oil Co. v. Conway, supra.

Stay orders are within the quoted language of the Judicial and District of Columbia Codes. They are writs not specifically provided for by statute; they are necessary to the exercise of appellate jurisdiction; they are agreeable to the usages and principles of law; they are necessary and proper remedial prerogative writs in aid of appellate jurisdiction. If they cannot be issued so as to preserve the status quo pending an appeal, the appellate power is without useful effect.

I think that Section 262 of the Judicial Code clearly evidences an intention by Congress that all of the Federal courts of appeals, including this court, shall have full power to make their appellate jurisdiction effective; and I think that Section 230 of the District of Columbia Code with equal clarity evidences the same intention in respect of this Court specifically. And I think that the quoted portion of the Communications Act clearly evidences the intention of Congress to make the appellate jurisdiction of the United States Court of Appeals over orders of the Communications Commission effective. Why otherwise did the

Congress use the language which I have italicized above empowering the court, in the event it reverses a decision of the Commission, to remand the case to the Commission "to carry out the judgment of the court," and the language "the court's judgment shall be final. * * *"? How can the judgment of the court be carried out and be final if, before the judgment has been rendered, an order of the Commission held erroneous has already been carried irreparably into effect?

In view of all of the statutory provisions above quoted, including the provision of the Federal Code that the circuit courts of appeals shall have power to issue all writs "not specifically provided for by statute," I cannot think that the mere absence in the Communications Act of language expressly authorizing the issuance of stay orders is conclusive of an absence of power in the court to issue them. I cannot conclude, as do the majority, that the making applicable, by Section 402(a) of the Communications Act, to suits to enforce, enjoin, set aside, amend or suspend orders of the Commission other than those made the subject of appeal in Section 402(b), of the provisions of the Urgent Deficiencies Act (Act of October 22, 1913, 38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, has the effect, merely because it thus by reference incorporates the stay order provisions of the Urgent Deficiencies Act, to exclude power to issue stay orders in appeals taken under Section 402(b). The only basis for such a conclusion is the doctrine expressio unius est exclusio alterius. This maxim is to be applied only as a means of discovering legislative intent, and is not to be permitted to defeat a plainly indicated purpose of the legislature. Springer v. Philippine Islands, 277 U. S. 189, 206 (1928); 25 R. C. L. 983; 59 C. J. 984-5. I think that the intention of Congress to confer an effective appellate jurisdiction upon this court is so [fol. 20] clearly evidenced in the statutes above quoted that the maxim is not applicable.

If I am correct in saying that the intention of Congress has been clearly evidenced, then recourse to legislative history is neither necessary nor permissible. In any event, I think the legislative history referred to by the majority is equivocal. It as much evidences a belief by Congress that no further legislation than that above set forth was neces-

sary to give the court power to issue stay orders as it evidences a contrary belief.

## II

The facts stated at the outset of this dissenting opinion make clear that the petitioners are within the class of persons named in the Communications Act as entitled to appeal. Each of them is, strictly within the language of Section 402(b)(2) of the Act, a "person aggrieved or whose interests are adversely affected by any decision of the Commission granting * * * any such application," i. e., such as is referred to in Section 402(b)(1), to wit, in these cases, an application "for modification of an existing radio station license." But not only is the standing of the petitioners to appeal thus within the language of the Act, also it is confirmed by the ruling of the Supreme Court in Commission v. Sanders Radio Station, 309 U. S. 470 (1940). In that case the respondent Sanders Radio Station appealed from an order of the Commission granting a construction permit to another station which would compete within the respondent's area in a manner which would, so the respondent contended, decrease its private revenues and impair its efficiency to serve the public interest, convenience and need. While the Supreme Court held, as I later point out in more detail in another connection, that economic injury to an existing station through the granting of station rights to a competitor is not in and of itself, apart from considerations of public interest, convenience and necessity, an element which the Commission must weigh in determining whether or not to grant rights to the competitor, the Court nevertheless also held that it did not follow that, because the licensee of an existing station could not successfully resist the granting of a license to another upon the mere ground that the resulting competition might work economic injury to the existing station, such licensee had no standing to appeal from an order of the Commission granting the competitor's application. On the contrary, the Court expressly pointed out that:

Congress had some purpose in enacting § 402 (b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commis-

sion in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. [309 U. S. at 477]

The Supreme Court held therefore:

> • • • that the respondent had the requisite standing to appeal and to raise, in the court below [the United States Court of Appeals], any relevant question of law in respect of the order of the Commission. [ibid.]

I think Perkins v. Lukens Steel Co., 310 U. S. 113 (1940), relied upon by the majority, distinguishable. That case held that the remedy to correct an alleged misconstruction of the Public Contracts Act by the Secretary of Labor [fol. 21] was through legislation or executive action, not through the suit of the respondent bidders for public contracts. The Supreme Court expressed the view that no legal rights of the respondents were shown to have been invaded or threatened. The Court said:

> • • • neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. • • • Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to *a particular right of their own*, as distinguished from the public's interest in the administration of the law • • • [110 U. S. at 125] [Italics supplied].

But the Sanders case, as I have just pointed out, expressly recognizes that persons in the position of the respondent in that case and of the petitioners in the instant cases have been selected by Congress—because likely to be financially injured by the Commission's action in respect of the licenses of others and because likely, therefore, to have a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission—to take appeals under Section 402(b) (2) of the Communications Act to vindicate the public interest. Moreover, I think the petitioners in the instant case do have particular rights of

their own which are the proper subject of a hearing before the Commission and t[illegible]fore of judicial consideration on appeal. I discuss this below in another connection. The Lukens case is further distinguishable for the reason that the Supreme Court predicated its decision therein upon the further propostion that the courts are without power to interfere with the internal affairs—the purchasing activities and machinery—of the Government. And the Court took pains to point out that it was such affairs that were the subject of the Public Contracts Act and that "The Act does not represent an exercise by Congress of regulatory power over private business or employment." But under the Communications Act the Commission is not an agency engaged in the dispatch of the internal affairs of the Government; its functions under the regulatory power of the Government over interstate commerce in radio communications. Radio Commission v. Nelson Bros. Co., 289 U. S. 266 (1933); F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134 (1940); Commission v. Sanders Radio Station, supra.

In my opinion L. Singer & Sons v. Union Pacific Railroad Company, decided December 16, 1940, by the Supreme Court (9 U. S. Law Week, No. 25, Sec. 4, p. 4089; U. S. Sup. Ct. Service (C. C. H., Oct. Term 1940) op. vol. 333) and relied upon by the majority, is also distinguishable. In that case the petitioners, L. Singer & Sons and Kansas City, Missouri, undertaking to proceed under paragraphs 18, 20, and 21, Section 402, Transportation Act 1920 (41 Stat. 456, 477, 49 U. S. C. § 1), sought a decree in a United States District Court enjoining the respondent Railroad Company from constructing or operating an alleged extension of its tracks. Paragraphs 18 and 20 of the Transportation Act provide:

(18) * * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction * * * of such * * * extended line. * * *

[fol. 22] (20) * * * Any construction * * * contrary to the provisions * * * of paragraph (18) * * * may be enjoined by any court of competent jurisdiction at the

suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest. • • •

The railroad extension involved was to be a proposed produce market in Kansas City, Kansas. L. Singer & Sons were engaged in the business of buying and selling at wholesale and retail fruits, vegetables and other products within and adjacent to a so-called capital city market of Kansas City, Missouri, and L. Singer & Sons and Kansas City, Missouri, itself asserted that the construction or operation of the extension "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest." The sole question in the case was whether or not the petitioners had a right to sue as "parties in interest" within the language of paragraph 20 above quoted. The decision, by a divided court, was in the negative. The case is distinguishable from the instant cases in three respects: First, the phrase "any party in interest" which was the subject of construction in that case is of much narrower ambit than Section 402(b) (2) of the Communications Act giving a right of appeal to "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting • • • any such application" (as is referred to in Section 402(b) (1)). Second, the theory of decision in the Singer case is evidenced by the following quotation therefrom:

• • • Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See Detroit & M. Ry. v. Browne City, etc., & Co., 286 Fed. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

But the recognition, just alluded to, in the Sanders case that persons in the position of the respondent there and of the petitioners here have been selected by Congress to take appeals makes the theory of decision of the Singer case inapplicable to the petitioners in the instant cases. Third, in the Singer case, the suit was for a permanent injunction, at least until by regular action of the Commission a certificate of convenience and necessity for the extension had been issued. In the instant cases the application is for a stay order pendente lite only.

III

If stay orders are to be issued, the petitioners must of course have made a prima facie showing that the Commission has erred. That is to say, if upon the face of the petitioners' allegations upon appeal there is no probability that the court would hold in the appeal that the Commission [fol. 23] had erred in the orders complained of, or in the manner of arriving at them, then the court, under elementary principles of judicial practice, would not be warranted in staying the Commission's orders pending appeal. But I think that such a prima facie case has been stated by the petitioners.

The error charged is the Commission's granting, *without a hearing to the petitioners*, such modification—extension—of the facilities of competitor stations as will adversely affect both the public interest and the private business of the petitioners. The Commission contends that such an allegation of error constitutes no prima facie showing. So far as alleged injury to the public interest is concerned, says the Commission, it has been given by Congress the duty of protecting the public interest and it is not to be presumed that it committed error even by denying the petitioners a hearing. And so far as the alleged injury to the private business of the appellants is concerned, the Commission

tells us that the petitioners have no private rights in respect of injury to which they are entitled to any hearing. In No. 7699, Puget Sound Broadcasting Company v. Federal Communications Commission, the Commission says:

The only right which can be spelled out of appellant's Petition for Stay or Notice of Appeal and Reasons for Appeal is the right to be protected from loss of its network affiliation and advertising revenues because of the proposed competition of another station. The Supreme Court's holding in the Sanders case establishes that no such right exists.

In No. 7657, Scripps-Howard Radio, Inc. v. Federal Communications Commission, the Commission states:

Appellant's claim to relief * * * is based upon a claim of threatened loss of a portion of appellant's service area. Such loss, however, does not constitute an invasion of any right of appellant and hence does not constitute a legal injury.

In respect of injury to the public interest. The proposition of the Commission that since it has been charged with the duty of protecting the public interest, it is not to be presumed that it can have committed error, is, in my opinion, refuted by Commission v. Sanders Radio Station. The premise underlying the recognition by the Supreme Court in the Sanders case that one in the position of the respondent there, the petitioners here, has the requisite standing to appeal and to raise in the United States Court of Appeals any relevant question of law in respect of the order of the Commission, and underlying the reference by the Supreme Court to such an appellant as a person having a sufficient interest to bring to the attention of the appellate court "errors of law in the action of the Commission in granting the [competitor's] license," is to the contrary of the proposition that the Commission cannot, either absolutely or presumptively, err in its rulings in respect of the public interest. If the Commission can do no wrong, why permit an appeal? It is clear from a reading of the Sanders case that the errors of law which the Court had primarily in mind were errors of law in respect of the action of the Commission in the public interest.

The Sanders case is, I think, also necessarily contrary to the contention of the Commission that it need grant the petitioners no hearing on the question whether proposed

action of the Commission will be in the public interest. It [fol. 24] follows from the fact that the respondent in the Sanders case and the petitioners here are persons intended by Congress "to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license," that such persons must be given hearings before the Commission in the course of which they may urge what would be a proper ruling by the Commission in the public interest. How otherwise could they give the Commission the benefit of their factual and legal contentions in vindication of the public interest? Moreover, the United States Court of Appeals is a court of review, not of first instance. It cannot for the first time consider evidence or arguments in respect of the duty of the Commission concerning the public interest. Therefore the petitioners, in order to protect the public interest upon appeal, must first have had an opportunity, in a hearing before the Commission itself, to present their evidence and their arguments in the public interest.

In respect of injury to the private right of the petitioners. The contention of the Commission that there is no private right in the petitioners which may be the subject of vindication in a hearing before the Commission is, I think, refuted by the terms and clear implications of the Communications Act itself—which recognize the existence of private rights in station licenses and which contemplate hearings in respect of their impairment or destruction; and the Commission's contention is in my opinion refuted also by the reasoning of the Supreme Court in F. C. C. v. Pottsville Broadcasting Co., and Radio Commission v. Nelson Bros. Co.; and I think the Commission's contention is given no support in the Sanders case, as I read that case.

The provisions of the Act to which I refer as recognizing a private right in station licensees, and as contemplating hearings in respect of such rights, are the following:

Sec. 301. It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, *beyond the terms, conditions, and periods of the license.* . . . (Italics supplied.)

Sec. 303.(f) * * * changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, *after a public hearing*, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with; * * * (Italics supplied.)

Sec. 303. (m) (2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days *for a hearing* upon such order * * * Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of *the hearing* which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension. (Italics supplied.)

Sec. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years * * * and any license granted may be revoked as hereinafter provided. * * *

Sec. 309. (b) (1) The station license shall not vest in the licensee any right to operate the station nor any right in [fol. 25] the use of the frequencies designated in the license *beyond the term thereof* nor in any other manner than authorized therein. (Italics supplied.)

Sec. 309. (b) (2) Niether the license nor *the right granted thereunder* shall be assigned or otherwise transferred in violation of this chapter. (Italics supplied.)

Sec. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failing to operate substantially as set forth in the license, or for violation of or failure to observe any

of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a *hearing* upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the *hearing* conducted under such rules as the Commission may prescribe. Upon the conclusion of said *hearing* the Commission may affirm, modify, or revoke said order of revocation. (Italics supplied.)

Sec. 312. (b) Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given *reasonable opportunity to show cause* why such an order of modification should not issue. (Italics supplied.)

Sec. 319. (b) * * * The *rights* under any such (construction) permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. * * * (Italics supplied.)

I am aware that the provisions in the Act for hearings speak in terms of licenses and rights which are undergoing alteration, suspension or revocation through direct action of the Commission thereon, and not in terms of the rights of existing licensees—such as those of the petitioners—which will be impaired by the direct action of the Commission granting or extending facilities to competitors. But I think that by clear implication the safeguards of the Act operate for the benefit of such licensees as the petitioners

also. For it cannot be doubted that the modification—in the instant cases the extension—of one license right may have the consequence, through competition, of impairing, or even of destroying, the business of an existing licensee; this in practical effect is a modification or revocation of his license. A contrary view would regard form rather than substance. That the granting of new or additional station rights may through competition have the consequence of impairing or destroying the business of an existing licensee is recognized in the Sanders case where the Supreme Court, after stating that it is not the purpose of the Act to protect a licensee against competition but to protect the public, states also:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately [fol. 26] to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. * * * (309 U. S. at 475-6.)

I think the true answer to the question what rights, if any, licensees under the Communications Act have, and to the question what legal protection such rights are entitled to, lies between the extreme position taken by the respondent and repudiated by the Supreme Court in the Sanders case, on the one hand, and the extreme position taken by the Commission in the instant cases on the other. The respondent in the Sanders case contended that its right under an existing station license was of such character as to make economic injury to that right a separate and independent element to be taken into consideration by the Commission in determining whether or not it should grant or withhold a license for a competing station. The position of the Commission in the instant cases is that the petitioners as station licensees have under the Act no rights at all which must be the subject of hearing and consideration by the Commission in determining whether it shall grant or withhold modifications of other licenses, with resultant competitive injury

to the petitioner licensees. In respect of the nature of the rights of a station licensee, the truth between these two extremes is, I think, that a station licensee has under the Act rights which, although not unlimited or indefeasible—they are limited in time and quality by the terms of the licenses under which they are granted and they are subject to suspension, modification or revocation in the public interest, and this either by act of the Commission directly affecting them or by competition resulting from direct action of the Commission in respect of competing licenses—are nevertheless rights recognized in the law as such. And in respect of the character of legal protection to which such rights are entitled, I think the truth between the two extremes is that these rights, limited though they are, nevertheless are rights which are not to be modified, suspended or revoked, either directly or through modification of the licenses of others, without a hearing on the question whether the public interest will be served by such modification, suspension or revocation.

Broad analogies to such rights are seen in license rights to practice the learned professions and to carry on a business. License rights to practice the learned professions are subject to the public interest that they be exercised only by persons of fit character and capacity, but they are not revoked without a hearing upon the question whether the licensee has ceased to be a person of fit character and capacity and whether, therefore, the public interest requires their revocation. And for comparison with the rights of the petitioners in the instant cases the analogies do not fail—as it may be suggested—because the holder of a license to practice a learned profession is not accorded a hearing upon the question whether a license shall be issued to others who may thereby become professional competitors. True, the holder of a right to practice a learned profession cannot insist upon a hearing upon the question whether a license shall be granted someone else to practice that profession generally; but licenses to practice the learned professions are not granted in respect of particularized facilities as are [fol. 27] broadcasting licenses which fix frequency, power and time. To the effect that there must be a hearing before disbarment of a lawyer see Ex parte Robinson, 86 U. S. 505 (1873); Garfield v. U. S. ex Rel. Spalding, 32 App. D. C. 153 (1908). And to the effect that there must be a hearing before revocation of a license to carry on a business

see Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837 (1924). In that case the Commission Merchants Regulation Act of Washington (Session Laws, 1923, p. 366, c. 134, Rem. Comp. Stat. (1923 Supp.) p. 481, § 8299), which required every commission merchant, as a condition precedent to engaging in his business, to procure a license from the state director of licenses, imposed upon such merchants the duty of rendering to the consignor within five days following a sale of agricultural products on commission a true statement concerning the sale, and the duty within ten days of paying to the consignor all sums due. The Act further provided (Section 8):

Whenever any consignor shall, after request, receive no remittance or report of sale, or if after receipt of any report or remittance be dissatisfied with such report or the amount of such remittance, he may make a verified complaint in writing to the director of agriculture who shall upon receipt of the same cause to be investigated the sale or sales complained of, and if upon such investigation it appears that the said commission merchant has failed or neglected to account for such consignment or any part thereof, or has failed or neglected to make a true and complete report thereof, *it shall be the duty of the director of licenses upon recommendation of the director of agriculture to revoke the license of such commission merchant;* and thereafter such commission merchant shall not be entitled to any license until the director of agriculture shall approve the issuance of a license to such person. (Italics supplied.)

In an action brought by merchandisers of timber products and of fruit and fruit products to enjoin enforcement of the Act as unconstitutional, it was held that Section 8 was void as permitting the state director of agriculture to revoke a merchant's license without an opportunity to be heard. The court said:

The spirit of our laws and institutions demands that a citizen be not deprived of his property or rights without notice. This act does not even intimate that before annulling a license the director of agriculture must give the holder a right to be heard. Under it, the director may make a secret investigation and revoke the license before the holder thereof has any intimation that anything is being done with reference thereto. Manifestly the license is a

thing of great value to the commission merchant, for under this law he may not prosecute his business at all without it. If it is revoked, his business is destroyed, and yet no revocation.

The state contends that the license is nothing more than a privilege, and may be revoked at any time without notice. It is not a license of that character. It may not be revoked arbitrarily as a matter of right and without cause. We are cited to State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 121 N. W. 658, 133 Am. St. Rep. 1060, as holding that a board of health which is given power to issue a license may revoke it without notice if the act is not arbitrary. If this case so holds, we cannot concur with it.

It is also argued that the license is not property, and therefore may be revoked without notice, and that the case of People ex rel. Lodes v. Department of Public Health of City of New York, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894, so holds. The act in question there provided that no milk should be offered for sale or delivery in the city without a written permit from the board of health, and that such permit was not property under the constitutional provision, but was merely a license, revocable by the board without notice to the holder. Manifestly, that case is not [fol. 28] controlling here. That was nothing more than a permit which apparently authorized the distribution of milk until it was revoked; but the license in this case authorizes the transaction of business for a definite period, and is not only property but very valuable property.

It is further argued by the state that the requirement of notice applies only to judicial proceedings and not to those before administrative officers. We can see no reason for such a distinction. As much damage may be done to the holder of the license by an administrative officer annulling it as by its annulment through an order of the court. In State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 P. 461, speaking of this subject, we said:

"The constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law, is not limited to judicial proceedings, but extends to every proceeding which may interfere with those rights, whether judicial, administrative, or executive." (131 Wash. at 409, 230 Pac. at 843.)

It is obvious that a station license issued under the Communications Act for a definite term for the conduct of a

broadcasting business requiring substantial investment is more than a mere privilege or gratuity. Whether or not it may be technically called a property right, it is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. To the effect that the courts extend protection against illegal injury by a public authority to rights limited by the public interest and revocable, see Red Canyon Sheep Co. v. Ickes, 69 App. D. C. 27, 98 F. (2d) 308 (1938), concerning licenses to graze upon the public domain. On the subject of hearing before revocation of licenses see Gelhorn, Administrative Law—Cases and Comments (1940), 372-382 inclusive.[3]

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[3] The following statements by the editor, although derisive of the efforts of courts to resolve the conflict between public interest and private right in respect of license revocations, are nevertheless pertinent and helpful as illustrating the distinction between mere privileges or gratuities which may be withdrawn or cut down without an opportunity to be heard and rights which, although of a limited nature, may not be taken away without a hearing.

"Two considerations have competed for supremacy in connection with the problem of license revocation. First there is the need of immediate public protection against continued activity under a license, when the licensee has misused his power. Against this is the fear that a speedy revocation of the license may result in catastrophe to the licensee; ill-advised administrative action may destroy his reputation or his investment without his having had an opportunity to present the facts upon which administrative action should depend. The attempted resolution of these conflicting considerations has, unfortunately, been marked by a particularly arid and unhelpful conceptualism. In the opinion of the editor, the basic force of neither consideration has been sufficiently served by present decisions or by the administrative methods that have ordinarily followed in their train.

"The prevalent judicial sentiment has been that when a license confers merely a privilege upon its holder, the privilege may be withdrawn without notice and without an opportunity to be heard (and, indeed, without any reason whatsoever, if the legislature chooses to demand none). Since a bare privilege may be withdrawn without the same process of law that is deemed to be 'due' when property in-

[fol. 29] Even if the Communications Act were doubtful in its recognition of the existence of rights in licensees and in its provision for hearings upon the question whether the public interest requires the reduction or destruction of such rights, I think it would be the duty of the court to construe the Act as recognizing such rights and providing for such hearings—and this for two reasons. First, in the absence of indubitably clear language requiring such a conclusion, it would be unthinkable to conclude that the Congress would provide for the granting of station licenses for radio broadcasting contemplating, in connection with operating a station, investment in building space and equipment, the hiring of talent, the contracting for advertising, and the employment of labor, but at the same time fail to recognize that by

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terests are at stake, the licensing officials may be given practically limitless authority to revoke permits of this character.

"On the other hand, of course, some licenses are regarded by the courts as conferring something much more valuable than a mere privilege terminable at will; rather, they vest in the licensee a property right which may not be taken away from him without prior notice and an opportunity for hearing.

"The assignment of licensed occupations or activities to the 'privilege' or the 'property' category, as the case may be, is, as might be expected, based very largely upon judicial conceptions of the desirability of the activity in question. And the appraisal of desirability is influenced, again to a very substantial degree, by the amount of investment the licensee has made in his business, though naturally the weight attached to this factor is not frankly stated in every opinion.

"Thus, for example, one finds that dance halls, pool rooms, dram shops and the like, which are not traditionally regarded as 'respectable,' may be maintained only by virtue of the gracious permission of the community, and that the 'privilege' to continue the maintenance of such a business is one surrounded by few legal protections.

"On the other hand, businesses that might also be regarded as not contributing largely to the flowering of the community seem to become, in the eyes of the courts, of a character beyond the reach of whimsical licensing officials if they involve a considerable investment."

whatever technical name they might be called, whether property rights or license rights, interests would arise, in the persons to whom licenses were granted, which should as a matter of fair play not be impaired or destroyed by the Communications Commission without a hearing upon the question whether the public interest would be served by their impairment or destruction. Right to a hearing before injury by the government in the public interest is one of the fundamental decencies guaranteed by democratic institutions. It is the safeguard of the Anglo-American legal system against arbitrary or capricious action by public authorities. No purpose should be attributed to Congress to deny such a right. Second, to construe doubtful language of Congress as permitting the impairment or destruction of such interests without a hearing would be to invalidate its action under the due process clause of the Fifth Amendment. That that clause protects against the arbitrary impairment or destruction of substantial rights even though they are limited by the public interest, is not open to doubt. Cf. Northern Cedar Co. v. French, supra.

I think the position which I take in respect of the existence of limited rights in a station licensee and in respect of right to a hearing upon the question whether the public interest will be served by the reduction or destruction of such rights by the modification of the facilities of another licensee is confirmed in F. C. C. v. Pottsville Broadcasting Co., supra. In that case the Pottsville Broadcasting Company was an applicant for a permit for the construction of a broadcasting station in Pottsville, Pennsylvania. After a hearing the Commission denied the application upon the ground that the Company was financially disqualified. The Company appealed to this Court. We found the Commission's conclusion regarding the Company's financial disqualification to have been based upon an erroneous concep-
[fol. 30] tion of Pennsylvania law, and we therefore reversed the decision and remanded the case to the Commission for reconsideration in accordance with the views we expressed. Following this remand the Company petitioned the Commission to grant its application. Instead, the Commission set the same for argument along with two rival applications, for the same facilities, which had been filed subsequent to that of the Pottsville Company. Hearings had been held by the Commission on these applications in a consolidated proceeding, but they were undisposed of when the Pottsville

Company case was returned to the Commission. The Commission directed that all three of the applications be set for argument to determine which would, on a comparative basis, in the judgment of the Commission best serve the public interest. The Pottsville Company then applied to this Court for and obtained a writ of mandamus commanding the Commission to set aside its order designating the Pottsville application for hearing on a comparative basis with the other two, and directing it to hear and reconsider the application of the Pottsville Company upon the basis of the record as originally made and in accordance with our opinion in the original appeal and in the mandamus proceeding. Our view was that since under the terms of Section 402 (c) of the Act, set forth in topic I above, this Court is to hear and determine appeals from the Commission upon the record before the court and has power upon such record to enter a judgment affirming or reversing the decision of the Commission and in the event of reversal to remand the case to the Commission to carry out the judgment of the Court, as final, and since, except for the error of law by the Commission in respect of the financial disqualification of the Pottsville Company, a license for a definite term would have been issued by the Commission to that Company, it was the duty of the Commission to accord priority to that Company by issuing a license to it.[4]

The Supreme Court took a different view. In reversing this Court it said: "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority." And the Court held that in its first disposition the Commission had committed a legal error did not create rights of priority in the Pottsville Company as against the later applicants which it did not otherwise possess through Congressional action.

The Pottsville case had to do, however, it is thus made apparent, with the question of priority—that is prior right among several applicants to receive a construction permit. And the case thus obviously dealt not with licensees and

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[4] Pottsville Broadcasting Co. v. Federal Communications Commission, 70 App. D. C. 157, 105 F. (2d) 36 (1939).

their rights, but with the interests of those who were seeking to be licensees. I therefore do not understand the decision at all to deny the existence, in those to whom licenses have been issued, of rights which are the proper subject of legal protection. On the contrary the language of the opinion of the Supreme Court at various points indicates, I think, recognition of the existence of a right in a licensee during the existence of the license. Thus, the opinion states (p. 137), referring to Section 307 (d) of the statute: "No [fol. 31] license was to be 'construed to create any right, beyond the terms, conditions, and periods of the license.'"

Again (p. 138): "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." Again, the opinion (p. 138) says: "Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years * * *" —thus recognizing the existence of an investment and of a license term. Again (p. 138) the Court says: "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." This at least impliedly recognizes that the Act dealt with private rights secondarily. Still further (p. 144) in defining the powers of the United States Court of Appeals in reviewing the Commission's orders, the Supreme Court said that the court of appeals "was restricted to a purely judicial review. 'Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision.'" The quotation was from Radio Commission v. Nelson Bros.

Co., supra, at page 276. And it is to be noted, finally, that the opinion of the Supreme Court in the Pottsville case states (p. 143): "To be sure, the laws under which these (administrative) agencies operate prescribe the fundamentals of *fair play*. They require that interested parties be afforded *an opportunity for hearing* and that *judgment must express a reasoned conclusion*. * * *" (Italics supplied.) These references to due process and the fundamentals of fair play and the opportunity for hearing and the necessity for a reasoned conclusion impliedly recognize the existence of a private right in licensees. The due process clause of the Fifth Amendment is phrased in terms of the property—as well as of the life and liberty—of persons. And these references to due process further recognize, I think, a right to a hearing before the private rights may be impaired or divested even in the public interest—a hearing, that is, upon the question whether the public interest will be served by the impairment or divesting of such rights.

I am aware that under the Sanders case the interest of an existing licensee against injury by competition cannot as such be successfully insisted upon. It must give way to the public interest, convenience and necessity. But I see nothing in the Sanders case which requires a ruling that there are no rights even of a limited nature, in a licensee, or that he is not entitled to a hearing upon the question whether the public interest requires the impairment or de- [fol. 32] struction of such rights through the extension or modification of the facilities of existing licensees.

In the Sanders case the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed an application for a construction permit to erect a broadcasting station in that city. The Sanders Radio Station which already held a broadcasting license for and had operated a station at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to remove its transmitter and station to Dubuque, and for leave to intervene in the Telegraph Herald proceeding. It alleged that there was an insufficiency of advertising revenue and talent for an additional station in Dubuque; that it was already rendering adequate service to Dubuque through its station in East Dubuque, so that there was no need for an additional radio outlet in Dubuque; that the granting of the Telegraph Herald's application would not serve the public interest, convenience and necessity. Intervention was per-

mitted, and a hearing was held. A showing was made by the Sanders station that it had operated at a loss, that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the Sanders station itself, and that more than half of the advertisers relied on to support the Telegraph Herald station had used the Sanders station for advertising. The broadcasting division of the Commission granted both applications, reciting in its order that public interest, convenience and necessity would be served by such action. It found both applicants legally, technically and financially qualified, and found that there would be no electrical interference. In an appeal taken to this court by the Sanders station, we held that one of the issues which the Commission should have tried, and upon which it ought to have made findings, was that of alleged economic injury to the Sanders station by the establishment of the Telegraph Herald station; and we set aside the action of the Commission in granting the Telegraph Herald permit without a finding upon such issue.[5] The Supreme Court reversed. It held that "resulting economic injury to a rival station is not, *in and of itself, and apart from considerations of public convenience, interest, or necessity*, an element the petitioner must weigh; and as to which it must make findings, in passing on an application for a broadcasting license." (Italics supplied) It said in similar terms "economic injury to an existing station is not *a separate and independent element* to be taken into consideration by the Commission in determining whether it shall grant or withhold a license." (Italics supplied).[6] The reasoning [fol. 33] of the Supreme Court in the Sanders case was that the Communications Act recognizes that broadcasters are not common carriers and that the field of broadcasting is

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[5] Sanders Bros. Radio Station v. Federal Communications Commission, 70 App. D. C. 297, 106 F. (2d) 321 (1939).

[6] This point of view was expressed in Tri-State Broadcasting Co. v. Federal Communications Commission, 71 App. D. C. 157, 158-9, 107 F. (2d) 956, 957 (1939), in an opinion for the court by Vinson, Associate Justice. The opinion said: "The owner of an existing station may well contend in any case that a new station may reduce the present income of his station, but it requires more to justify the Commission refusing to grant the new license. A mere showing that the income of an existing station may be reduced if

one of free competition open to anyone if there is an available frequency. It is true that the Court said also:

> The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his program attractive to the public. [309 U. S. at 475]

But the Court nevertheless said still further:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. [id. at 475-6]

And then the Court said:

> • • • These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a

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another station enters its field is not sufficient. The appellant recognizes that such can not be the criterion of economic injury herein, as it charges that the competition complained of will be destructive and ruinous. The character of competition may affect the public interest, convenience and necessity, which is the statutory criterion under which the Commission must act. • • •"

valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives, which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license. [id. at 476]

The Sanders case was decided by the Supreme Court but a few weeks later than the Pottsville case. While it does not refer to the same, it is not I think to be taken in any manner to overrule or modify that case or Radio Commission v. Nelson Bros. Co. which was referred to in the Pottsville case. The Sanders case leaves standing therefore the recognition in the Pottsville case of the existence of private rights in licensees, of rights to a hearing in respect of the same, of a duty of fair play by the Commission, of the guarantee of the due process clause. It leaves standing also the Nelson Bros. case wherein the Supreme Court said (at page 285):

In granting licenses the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare N. Y. Central Securities Co. v. United States, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment *the equities of existing stations undoubtedly demand consideration.* * * * [Italics supplied]

[fol. 34] The statement in the Sanders case that the policy of the Act is clearly that no person is to have "anything in the nature of a property right as the result of the granting of a license" must be read in connection with the opinion as a whole, and in connection with the utterances of the Court in the Pottsville and Nelson Bros. cases. Moreover notwithstanding this statement in the Sanders case, the

opinion therein recognized that the Sanders Company and persons in its position might be "financially injured by the issue of a license." This implies the existence of some right to be injured. Also, in the Sanders case the Court was occupied not with the question as to what right, if any, existed in a station licensee, but with the question whether the rights or interests of a station licensee, whatever they were, or by whatever name called, were such that economic injury to them must be taken into consideration by the Commission as a separate and independent element—irrespective of the public interest—in determining whether or not it should grant or withhold a license to another. I think therefore that the Supreme Court in the Sanders case in its reference to the absence of "anything in the nature of a property right as the result of the granting of a license," is using the term property right in the sense of a right absolute or indefeasible. I do not think the decision was intended to be taken as meaning that no right even of a nature limited by the public interest exists in a licensee. Neither do I think that the decision was intended to mean that an existing broadcasting station and the investment therein may be injured or destroyed by the introduction of competition through a new licensee or through the extension or modification of the facilities of other existing licensees without a hearing before the Commission on the question whether the public interest, convenience and need will be served by such injury or destruction.

Certainly the opinion in the Sanders case does not purport to write out of the statute the many provisions above quoted which recognize the existence of some right in a licensee while the license subsists, and which recognize the right to a hearing before a license is altered, suspended or revoked, directly, or, as I think, indirectly. I think therefore the reliance of the Commission on the Sanders case for the proposition that station licensees have no rights whatever is without avail.

I conclude that the United States Court of Appeals has power to issue stay orders, that the petitioners are within the class of persons named in the statute as entitled to appeal, and that on the face of their petitions for stay orders and petitions for appeal, they have made such a prima facie case of erroneous action by the Commission in denying them a hearing as warrants the issuance of the stay orders applied for.

[fol. 35] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

[Title omitted]

ORDER TO TRANSMIT CERTIFICATE—Filed August 8, 1941

It is this eighth day of August, 1941, Ordered that the Clerk of this Court be, and he is hereby, directed to transmit the certificate of the United States Court of Appeals for the District of Columbia in the above entitled cause to the Supreme Court of the United States for a determination of the question therein certified.

By the Court:

(Signed) D. Lawrence Groner, Chief Justice.

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[fol. 36] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CERTIFICATE OF CLERK

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 34, both inclusive, constitute the original certificate of said Court of Appeals to the Supreme Court of the United States filed in the case of Scripps-Howard Radio Company, Appellant, vs. Federal Communications Commission, No. 7657 in said Court of Appeals, and that the signatures thereto appearing on page 5 are the true signatures of D. Lawrence Groner, Chief Justice, and Harold M. Stephens, Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices, respectively, of the said United States Court of Appeals for the District of Columbia, duly commissioned and qualified;

I further certify that pages 6 to 34, both inclusive, of said certificate constitute a true copy of the opinion of said Court of Appeals and of the dissenting opinion referred to in the fourth paragraph of said certificate and made a part of said certificate in said case; and that page 35 constitutes a true copy of the order to transmit certificate, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court of Appeals, at the City of Washington, in the District of Columbia, this 8th day of August, A. D. 1941.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

Endorsed on Cover: File No. 45836. U. S. Court of Appeals for the District of Columbia. Term No. 508. Scripps-Howard Radio, Inc., (Certificate) vs. Federal Communications Commission. Filed August 13, 1941. Term No. 508 O. T. 1941.